

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,)	
)	
Plaintiff-Appellee,)	
)	
v.)	No. 00-5212
)	
MICROSOFT CORPORATION)	
)	
Defendant-Appellant.)	
-----)	
)	
STATE OF NEW YORK, <i>et al.</i> ,)	
)	
Plaintiffs-Appellees,)	
)	
v.)	No. 00-5213
)	
MICROSOFT CORPORATION)	
)	
Defendant-Appellant.)	

**MOTION FOR LEAVE TO FILE AN AMICUS BRIEF
BY CARL LUNDGREN**

1. **Interest of the Amicus Curiae.** Carl Lundgren is the author and inventor of a new economic method for preventing collusion, which is described in the published academic paper, "Using Relative Profit Incentives to Prevent Collusion," (Review of Industrial Organization, Volume 11, Number 4, August 1996, pp. 533-550). Carl Lundgren is also the sole proprietor of Valmarpro Antitrust, which is a business established by Carl Lundgren to exploit the value of an economic invention (patent pending) for preventing collusion between business firms.

2. Prior Contact with the Parties and District Court. On December 2, 1999 Carl Lundgren mailed, "An Open Letter to All Parties in the Microsoft Antitrust Mediation Process," which proposed a remedy for the Microsoft case that involves use of the Lundgren economic method for preventing collusion. On April 25, 2000 Carl Lundgren filed with the District Court a "Request to File a Friend of the Court Brief on Behalf of Valmarpro Antitrust" along with a "Brief Amicus Curiae of Valmarpro Antitrust on Behalf of an Alternative Remedy for Microsoft Based on Using Relative Profit Incentives" (filing denied, no reasons given). On May 17, 2000 Carl Lundgren filed with the District Court a "Motion by Valmarpro Antitrust to Intervene as an Independent Third Party" (motion denied, no reasons given).

3. Nature of the Amicus Brief to Be Filed. I propose to file an amicus brief to discuss the need for more extensive remedy hearings, including the need to admit third parties with alternative remedy proposals. I do not propose to file any arguments either favoring or opposing the findings of fact or conclusions of law adopted by the District Court. The brief is intended to address a perceived procedural error of the District Court, in failing to provide remedy hearings of sufficient scope, independence, and competency to arrive at a sound judgement concerning the most appropriate remedy.

4. Nature of Antitrust Remedies. An antitrust remedy is not a punishment, nor is it a payment of damages, for past wrongdoing. Rather, it is a regulatory apparatus which is adopted by

the Court for the various forward-looking purposes of terminating unlawful conduct, preventing the repetition of unlawful conduct, reviving competition in the relevant markets, and preventing the enjoyment of unlawfully obtained monopoly power. The regulatory apparatus requires care in its formulation, to determine whether it achieves the objectives to be sought, and that it does so with maximum net benefit (benefits net of costs, all benefits and costs considered, including costs and benefits to third parties and the public at large), subject to the constraints of equity and legality.

5. The Choice of Remedy Is Not Simply a Dispute Between Two Parties. The choice of remedy has repercussions, not simply for Microsoft, but for the computer industry as a whole and the economy as a whole. The choice of remedies is not simply a private dispute between Microsoft and the government, but involves a choice among multiple possible solutions, affecting multiple interests. The remedy stage of an antitrust case is more like a regulatory matter, and less like an adversarial proceeding. Regulatory proceedings frequently admit multiple parties. Restricting the remedy phase of trial to only two parties (Microsoft and government) is not an effective way to ascertain the best remedy.

6. Status of Proposed Amicus Brief. The proposed amicus brief is neither pro-government nor pro-Microsoft, but is instead an independent brief supporting more extensive remedy hearings. The brief would be "pro-government" only in the limited sense

that the need for a remedy pre-supposes that there were antitrust violations by Microsoft Corporation. The brief would be "pro-Microsoft" only in the limited sense that Microsoft may have a procedural interest in delay, or may prefer to "gamble" that a more extensive remedies hearing may yield an outcome more favorable to itself.

7. **Proposed Deadlines for Filing.** Since the proposed amicus brief is neither pro-government nor pro-Microsoft, I propose a filing date that is exactly midway between the filing dates for pro-Microsoft briefs and pro-government briefs. This proposed filing date is December 20, 2000. This date would give Microsoft plenty of time to respond to any points raised. The government would likewise have plenty of time to respond, since any points raised in the brief would pertain only to the government's proposed remedy and the District Court's remedy hearing procedures; the government's legal victory regarding findings of fact and conclusions of law would not be jeopardized by the proposed amicus brief. I stand ready to meet any alternative deadline which may be imposed by the Court.

8. **Attorneys on Brief to Be Determined.** I only recently ascertained that an attorney would be needed to file an amicus brief before the Appeals Court. I will attempt to procure an attorney for the purpose of filing an amicus brief by the proposed deadline, or by such other deadline as may be imposed by the Court.

9. **Motion Revised to Obtain Filing Rights.** I originally

filed this motion under the title of "Notice of Intent to File an Amicus Brief by Valmarpro Antitrust." However, I was advised by Deputy Clerk John Haley that I could not file a notice of intent without consent of all parties, but should instead file a motion for leave. He also advised that I could not file the motion as a business without an attorney, but that I could file a motion pro se as an individual. This raises the interesting Constitutional question of why a business does not have the same right as an individual to petition the Court for a redress of grievances, and to do so without an attorney. The substance of my filing remains the same.

Respectfully submitted.

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Dated: October 25, 2000

CERTIFICATE OF SERVICE

Service of the foregoing was made by sending a copy thereof, in a sealed envelope, postage fully prepaid, addressed to:

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and deposited in the United States Mail by the undersigned this 25th day of October, 2000.

Carl Lundgren